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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

LYDIA MAGRAS,	)	
	)	
Appellant,	)	**Crim. App. No. 2000-583**
	)	
v.	)	
	)	Re: Terr. Ct. Crim. Nos. F292A & 351/1998
GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Appellee.	)	
	)	
	)	

On Appeal from the Territorial Court of the Virgin Islands

Considered May 18, 2001
Filed December 10, 2001

BEFORE: **RAYMOND L. FINCH,** Chief Judge of the District Court of the Virgin Islands; **THOMAS K. MOORE,** Judge of the District Court of the Virgin Islands; and **EDGAR D. ROSS,** Judge of the Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

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OPINION OF THE COURT

PER CURIAM.

On May 27, 2000, Lydia Magras ["Magras" or "appellant"], a/k/a Lydia Greaux, pleaded nolo contendere in Territorial Court to one count of compounding-a-crime in violation of section 521(a) of title 14 of the Virgin Islands Code. The charge arose from her alleged receipt of funds in exchange for concealing the embezzlement by Lorraine Quetel, Magras' cousin and business partner at Bon Voyage Travel Agency ["Bon Voyage"], of $1.7 million from L.S. Holdings, Inc., d/b/a Little Switzerland ["Little Switzerland"], where Quetel worked as a bookkeeper. The trial court judge accepted the plea and sentenced Magras to thirty-three months incarceration.

Appellant raises the following issues in her timely appeal:

1. Whether 14 V.I.C. § 521(a) is constitutionally defective on its face for vagueness and/or overbreadth;

2. Whether 14 V.I.C. § 521(a) is constitutionally defective as applied to her;

3. Whether use of a "dead letter" law violated her due process rights;

4. Whether the judge erred in sentencing Magras to thirty-three months incarceration for this first-time, non-violent offense instead of imposing a sentence of probation with restitution pursuant to 5 V.I.C. § 3721.

Because 14 V.I.C. § 521(a) is neither constitutionally defective nor a "dead letter" law, and because the trial court judge did not abuse his discretion in sentencing Magras to a period of

incarceration within the guidelines provided by 14 V.I.C. § 521(a), we will affirm.

I. FACTUAL AND LEGAL BACKGROUND

Magras avoided a trial by pleading nolo contendere to one count of compounding a crime, therefore the record is lean of facts. The two sides do not dispute that Lydia Magras was the co-owner and cofounder of Bon Voyage Travel Agency in Frenchtown, St. Thomas, along with Evelyn Shoemaker. In 1996, Magras bought out Ms. Shoemaker's share of the business and later that same year took on a new partner, Lorraine Quetel. Quetel paid Magras the first installment of the $170,000 due under their Partnership Agreement with a $25,000 check drawn on the account of Little Switzerland, where Quetel was a bookkeeper authorized to write checks for limited business-related purposes. Quetel's act would be the first of many acts of embezzlement, totaling about $1.7 million. This single act of embezzlement, however, along with the subsequent deposit of the check is the basis for the sole remaining count, Count III of the Amended Complaint, to which Magras, formerly Greaux, pleaded nolo contendere. Count III alleged:

> On or about August 12, 1996, in St. Thomas, U.S. Virgin Islands, Lydia Greaux had knowledge of the actual commission of a crime of embezzlement, and did

> take the money of another upon an express or implied agreement to compound or conceal said crime, in that:
>
> a. Lorraine Quetel was a clerk at Little Switzerland, and had care and control over Little Switzerland property, as she was the bookkeeper in charge of Little Switzerland's Scotia bank checking account # 044-07144-10,
> b. Lorraine Quetel was only authorized to write checks from that account in order to place the money into another Little Switzerland account, and to no other person or entity,
> c. Lorraine Quetel fraudulently appropriated to her own use the property of Little Switzerland, by writing check #362 for $25,000.00 from that account to Bon Voyage Travel, which is operated by Lydia Greaux,
> d. said money was deposited into Bon Voyage Travel's Banco Popular account #194601004, with Lydia Greaux' knowledge and consent in order to keep and conceal said funds,
> e. Lydia Greaux is an authorized signitor [sic] of Banco Popular account # 194601004, and thus had free access to those funds for her own purposes,
> f. and Lydia Greaux did in fact take some of those funds for agreeing to keep and conceal said funds, all in violation of 14 V.I.C. § 1093, 14 V.I.C. § 1094(a)(2) and 14 V.I.C. § 521(a)(2).

(Am. Information at 4 (appearing on unnumbered page at rear of Appellant Br.).)

Although Magras' plea amounts to an admission of the facts alleged in Count III, she nonetheless maintains in her brief that she was an unknowing victim of Quetel's scheme just as Little Switzerland was. Magras claims that she trusted Quetel's explanation for the origin of the $25,000 check: the funds came from a Little Switzerland account because they were liquidated

from Quetel's 401k plan at Little Switzerland. With respect to the continuing embezzlement of Quetel, Magras claims that she had turned over the financial matters of Bon Voyage to Quetel, a bookkeeper by profession, and was therefore unaware of Quetel's machinations. Quetel funneled the funds through Bon Voyage without her knowledge and even embezzled legitimate Bon Voyage funds.

The government paints a different picture: Magras not only knew the funds were embezzled, but she encouraged Quetel to obtain ever-larger sums and promised to conceal the crimes. Magras' endorsement of some twenty checks written on a Little Switzerland account and made out to Bon Voyage evidence Magras' knowledge and participation in the scheme. The government further contends that Magras used her share of the embezzled funds to go on a personal spending spree, purchasing a house, various cars, a nightclub, and making checks to herself, her family and friends, and to cash in the amount of some $240,000.

The embezzlement scheme was uncovered at the end of 1997. Quetel confessed to her role on January 29, 1998, and authorities obtained an arrest warrant for Magras that same day. The government's amended complaint included twenty-six counts against Magras, all but Count III of which the government dismissed pursuant to Magras' agreement to plead nolo contendere to Count

III.[1] The plea agreement preserved Magras right to appeal the constitutionality of the "compounding-a-crime" statute at 14 V.I.C. § 521(a).

II. DISCUSSION

Title 5, section 521(a) of the Virgin Islands Code states:

> Whoever, having knowledge of the actual commission of a crime, takes money or property of another or any gratuity or reward, or an engagement or promise therefor, upon any agreement or understanding, express or implied, to compound or conceal such crime, or a violation of this title or other law, or to abstain from, discontinue, or delay, a prosecution therefor, or to withhold any evidence thereof, except in a case provided for by law in which the crime may be compromised by leave of court, shall be imprisoned not more than--
> . . .
> (2) three years, where the agreement or understanding relates to any other felony; . . .

Magras alleges that section 521(a) is constitutionally defective on its face for vagueness and/or overbreadth and as applied to her, and that as a "dead letter," *i.e.*, obsolete and never used in the Virgin Islands, its use in this case violated due process. She also claims that the trial court judge abused his discretion by sentencing her to thirty-three months imprisonment for a first-time, non-violent offense instead of

[1] In exchange for her plea, the government also agreed to consolidate the cases against her.

imposing a sentence of probation with restitution pursuant to 5 V.I.C. § 3721.

A. Jurisdiction and Standard of Review

This Court has jurisdiction to review final judgments and orders of the Territorial Court in all criminal cases, except generally where the defendant was convicted by guilty plea.[2] *See* 4 V.I.C. § 33.[3] Our review of constitutional claims is plenary. *See Nibbs v. Roberts*, 31 V.I. 196, 204 (D.V.I. App. Div. 1995).[4] In general, the severity of a sentence is not subject to review so long as it falls within the statutory limits. *See Chick v. Government of the Virgin Islands*, 941 F. Supp. 49, 50-51 (D.V.I. App. Div. 1996). The standard for reviewing a sentence is abuse of discretion. *See Government of the Virgin Islands v. Grant*, 21 V.I. 20, 1984 U.S. Dist. LEXIS 16265 (D.V.I. App. Div. 1984).

B. Plea of Nolo Contendere

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[2] This would seem to permit an appeal after a plea of nolo contendere, even though the effect of a nolo contendere plea is equivalent in most ways to a guilty plea.

[3] *See* Revised Organic Act of 1954 § 23A; 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2000), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2000) (preceding V.I. CODE ANN. tit. 1) ["REV. ORG. ACT"].

[4] *See also Monsanto-Swan v. Government of the Virgin Islands*, 33 V.I. 138, 141, 918 F. Supp. 872, 874 (D.V.I. App. Div. 1996) ("Section 23A(a) of the Revised Organic Act, provides that 'the [Virgin Islands] legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States . . . .' 48 U.S.C. § 1613a(a).").

Rule 11(a)(1) of the Federal Rules of Criminal Procedure permits a defendant, with the consent of the court, to plead nolo contendere.[5] "Nolo contendere" simple means "I will not contest it." *See Lott v. United States*, 367 U.S. 421, 426 (1961) (citation omitted). The defendant does not admit or deny the charges, but may be sentenced as if she had pleaded guilty. *See* BLACK'S LAW DICTIONARY 1048 (6th ed. 1991). "The principle difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based on the same act." *Id.* A plea of nolo contendere therefore admits "every essential element of the offense (that is) well pleaded in the charge" and is "tantamount to an admission of guilt for purposes of the case." *Lott*, 367 U.S. at 426 (internal quotations and citations omitted). After a plea of nolo contendere is entered, "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists . . . ." *Id.* (citation omitted).

Magras' plea of nolo contendere on Court III is tantamount to an admission of those facts. Count III alleged that on August 12, 1996, Magras had actual knowledge of a crime of embezzlement

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[5] Rule 11(a)(1) of the Federal Rules of Criminal Procedure apply to the Territorial Court since it does not contravene any Territorial Court Rule. *See* TERR. CT. R. 7 ("The practices and procedure in the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by . . . the Federal Rules of Criminal Procedure . . . .").

and did take money upon an express or implied agreement to compound or conceal the crime when she knowingly consented to the deposit of a check for $25,000 fraudulently drawn on a Little Switzerland account by Quetel and deposited in a Bon Voyage account, and when she took some of those funds for agreeing to keep the funds and conceal the crime. For the purposes of this appeal, we begin our analysis from the position that Magras did the things alleged in Count III. Only the legality of the statute and the sentence are at issue.

B. Constitutionality of the Virgin Islands "Compounding-a-Crime" Statute

1. 14 V.I.C. § 521 Is Not Vague on Its Face or As Applied

Magras asserts that 14 V.I.C. § 521 is unconstitutionally vague because (1) it fails to adequately warn the public of proscribed conduct, (2) it provides no safeguards against arbitrary and discriminatory enforcement, and (3) it impinges on her First Amendment right of association, Fourth Amendment right of privacy, and Fifth Amendment right not to incriminate herself.[6]

A law can be attacked as imprecise on its face under two different doctrines, overbreadth and vagueness. *See City of*

[6] Magras includes with her vagueness and overbreadth argument several subsections addressing Roman law, Danish law, English common law, Alaska territory law, and New York law, none of which, however, address the Virgin Islands statute at issue, much less whether it is vague and/or overbroad.

Chicago v. Morales, 527 U.S. 41, 52 (1999). The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of Constitutional rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973)). Even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

Magras' first and second arguments are that 14 V.I.C. § 521 fails to adequately warn the public of proscribed conduct and that it provides no safeguards against arbitrary and discriminatory enforcement. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966). In *City of Chicago,* the Court upheld a state court decision that struck down Chicago's anti-loitering ordinance—which defined "loitering" as "to remain in any one place with no apparent purpose"—as unconstitutionally vague due

to its failure to distinguish between innocent conduct and conduct threatening harm. *See* 527 U.S. at 57 (noting that a number of state courts have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent). The Court also found that the ordinance's broad sweep violated the requirement that a legislature establish minimal guidelines to govern law enforcement, since police officers could order the dispersal of any citizens standing around whose purpose was unknown to the officers. *See id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

The Virgin Islands compounding-a-crime statute does not suffer from either of the infirmities that plagued the Chicago anti-loitering ordinance. The statute clearly distinguishes between innocent conduct and conduct threatening harm by prohibiting a person with notice of an actual crime from accepting payment or other consideration in exchange for compounding or concealing the crime or hindering its prosecution. Regarding Magras' assertion that the statute gives no notice of how much knowledge is required, the statute plainly states that the defendant must act "having knowledge of the actual commission of a crime." "Knowledge" in this case means "personal knowledge." *See* 1 V.I.C. § 41. The concept of "knowledge" is not unfamiliar to police, courts, and juries, as over thirty

criminal statutes require that a defendant act while knowing a certain fact or circumstance.[7] Had the case gone to trial, the government would have had to prove knowledge, as well as the existence of an agreement or understanding, beyond a reasonable doubt. We do not find, therefore, that the statute is impermissibly vague for failure to adequately establish fair notice for the public and standards for the police that are sufficient to guard against the punishment of innocent conduct and the arbitrary deprivation of liberty interests.

Magras next argues that the statute impinges her First Amendment right of association, Fourth Amendment right of privacy, and Fifth Amendment right not to incriminate herself. As noted, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of Constitutional rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *See City of Chicago*, 527 U.S. at 52 (citing *Broadrick*, 413 U.S. at 612-615). It is unclear how the statute impinges on Magras' First Amendment rights, since it does not criminalize association or speech. In fact it does not even require a person to turn in someone she knows has committed a

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[7] *See, e.g.*, 14 V.I.C. § 12(a) (acting while "knowing that a crime or offense has been committed"); *id.* § 185 (acting while knowing an animal is vicious); *id.* § 435 (acting while knowing drawer has insufficient funds).

crime. Rather, it prohibits positive acts made with knowledge of a crime: the act of agreeing to conceal the crime and the act of accepting payment or consideration in exchange for the concealment are both required. The statute also does not violate her Fifth Amendment right against self-incrimination by imposing an affirmative duty to make statements to law enforcement officials as Magras' alleges. *See, e.g.*, *Mangeris v. Gordon*, 580 P.2d 481 483-84 (Nev. 1978) (mere silence is insufficient to establish liability" under compounding-a-crime statute). As for Magras' claim that the statute violates her Fourth Amendment right to privacy, this argument is so lacking in merit that we decline to dignify it with a response.

Magras proffers a hypothetical fact pattern about a defendant who does not know her business partner is an embezzler and who unwittingly accepts proceeds of the embezzlement, only to suspect embezzlement later, to argue that the statute criminalizes innocent conduct. (Appellant Br. at 27.) The statute requires "knowledge of the actual commission of a crime," not mere suspicion of a crime. *See* 14 V.I.C. § 521(a). Further, the statute is worded to require that the receipt of payment or other consideration be contemporaneous with the knowledge of the crime. Magras' hypothetical is wholly inappropriate to the analysis of this statute, because it separates the knowledge, the

mens rea, from the act of accepting money or consideration, the *actus reus*. The compounding-a-crime statute conforms to the rule: *Actus non facit reum, nisi mens sit rea.*[8] Magras' hypothetical does not.

Magras' argument that the statute is unconstitutionally vague as applied to her, because it compels her to implicate herself as a coconspirator and participant in the actual embezzlement, also fails. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis, *see Maynard v. Cartwright*, 486 U.S. 356, 361 (1988),[9] not with reference to hypothetical cases, *see United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *See United States v. Harriss*, 347 U.S. 612, 617 (1954). In determining the sufficiency of the notice, a statute must be examined in the light of the conduct with which a defendant is charged. *See*

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[8] An act does not make guilty, unless the mind be guilty.

[9] *See also United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. Mazurie*, 419 U.S. 544 (1975); *Palmer v. City of Euclid*, 402 U.S. (1971) (per curiam); *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963).

Robinson v. United States, 324 U.S. 282 (1945). In this case, Magras was charged with, and by way of her plea conceded to, concealing knowledge of an actual crime in exchange for payment. She should have reasonably understood that this conduct, as opposed to the hypothetical conduct she tries to sublimate into the facts of this case, is proscribed.

2. Enforcement of 14 V.I.C. § 521 Does Not Violate Due Process.

Magras asserts that the enforcement of 14 V.I.C. § 521 violates due process, because it is a "dead letter" law[10] and for other anachronistic rationales. This is a creative argument, but unlike the stereotypical centuries-old statute prohibiting the carrying of chickens across county lines (enacted at the time for reasons irrelevant today, for example, to curb chicken smuggling which may have been rampant then), the Virgin Islands compounding-a-crime statute is still as relevant as ever. There is simply no basis for us to adopt the extreme position that this law is obsolete.

Magras argues that the common-law crime of misprision of felony is no longer on the books of most jurisdiction, therefore compounding-a-crime should not be. Besides the fact that such argument should be directed to the Legislature, compounding-a-

[10] A "dead letter" law is "a law that has become obsolete by long disuse." *See* BLACK'S LAW DICTIONARY 398 (6th ed. 1991).

crime and misprision of felony are not equivalent offenses. "Misprision of felony" is the "offense of concealing a felony committed by another, but without previous concert with or subsequent assistance to the felon . . . ." *See* BLACK'S LAW DICTIONARY 1000 (6th ed. 1991). It is still a federal crime, *see* 18 U.S.C. § 4, and it requires fewer elements, making it easier to prove than the offense of compounding-a-crime in the Virgin Islands.[11] Finally, the offense of compounding-a-crime is still on the books of most jurisdictions.[12]

Magras' plea for a restrictive reading of the statute based on the common law offense of theft-bote is similarly rejected. Theft-bote, which was an offense only when the victim of a felony accepted his goods back or some other payment in exchange for not prosecuting the felon, *see* BLACK'S LAW DICTIONARY 1477 (6th ed. 1991), is not the offense at issue here. Section 521(a) of the

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[11] Although the federal misprision of felony carries the same three year maximum sentence as our compounding-a-crime offense, it is easier to prove, as misprision of felony does not include the element of accepting payment or other consideration for the concealment.

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4.

[12] *See Forcing Bystanders to Get Involved: The Case for Statutes Requiring Witnesses to Report Crimes*, 94 Yale L.J. 1787, 1799 and n.98 (1985).

Virgin Islands Code states "Whoever, having knowledge of the actual commission of a crime, takes money . . . upon any agreement or understanding . . . to compound or conceal such crime . . . shall be imprisoned not more than . . . three years." 14 V.I.C. § 521(a) (emphasis added). "Whoever" clearly includes Magras.

C. The Sentencing Judge Did Not Abuse His Discretion by Sentencing Magras to Thirty-Three Months in Prison.

Magras next claims that the trial court judge abused his discretion by sentencing her to thirty-three months incarceration for a first-time, non-violent offense instead of imposing a sentence of probation with restitution pursuant to 5 V.I.C. § 3721. As we recently reiterated, absent procedural defects in the sentencing itself, trial courts have "virtually unfettered discretion" in imposing a sentence within statutory guidelines and such sentences may not be disturbed on appeal. *See Walker v. Government of the Virgin Islands*, 124 F. Supp. 2d 933, 936-37 (D.V.I. App. Div. 2000) (finding procedural faults in sentencing). The statute provides for a sentence up to three years, and Magras received thirty-three months, less than the maximum. Magras asserts no procedural faults in her sentencing. Rather she states that the trial court judge "should have" imposed restitution instead of incarceration, that he was "authorized" to require restitution, and "may" order it in lieu

of a term of imprisonment. (Appellant Br. at 56.) This is not enough to show an abuse of discretion.[13] Thus, the trial judge did not abuse his discretion by sentencing Magras to thirty-three months in prison.

III. CONCLUSION

The Virgin Islands compounding-a-crime statute, facially and as applied, does not violate Magras' constitutional rights and is not an anachronism or "dead-letter" law requiring judicial nullification. Further, the trial judge did not abuse his discretion when he sentence Magras to be incarcerated for thirty-three months. Therefore, this Court will affirm Magras' sentence.

ENTERED this 10th day of December, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

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[13] Magras' attempt to synthesize an argument for why a suspended sentence from 34 V.I.C. § 203(d)(3) (a "judge shall order restitution at every sentencing for a crime against person or property . . . unless the court finds substantial and compelling reason not to order restitution.") and *Karpouzis v. Government of the Virgin Islands*, 41 V.I. 179, 182, 58 F. Supp. 2d 635, 637-38 (D.V.I. App. Div. 1999) (holding that 5 V.I.C. § 3721 permits restitution only when a court imposes sentence of straight probation or no more than six months imprisonment followed by a period of probation) is too specious to warrant discussion.

By:_____/s/_____
Deputy Clerk

Not for publication

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DIVISION OF ST. THOMAS AND ST. JOHN
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Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

ORDER

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

ORDERED that the trial court's sentence is hereby **AFFIRMED.**

ENTERED this 10th day of December, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk